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FACEBOOK, INC. and MARK ZUCKERBERG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU, INC. (formerly known as CONNECTU, LLC), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, and DAVID GUCWA AND DOES 1-25,

Defendants.

Case No. 5:07-CV-01389-RS

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR EVIDENTIARY AND RELATED SANCTIONS AGAINST DEFENDANTS CONNECTU, INC., CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, AND THEIR COUNSEL

Date: October 10, 2007
Time: 9:30 A.M.
Judge: Honorable Richard Seeborg

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I. INTRODUCTION

This is a motion about whether counsel and its clients can attempt to perpetrate a fraud by submitting false testimony to further a litigation agenda. The false statements were not an isolated incident but rather were part of a deliberate and concerted effort to mislead counsel and the Court. It is of no consequence that the Defendants may have succeeded for other reasons. It is the abuse of the court process and lack of respect for the judicial system that warrants sanctions.

For months in this action, Defendants argued in pleadings, declarations, depositions and discovery responses that Divya Narendra always was a member of ConnectU, LLC and immune to personal jurisdiction in California under a so-called "fiduciary shield" doctrine. Defendants represented to the Court and swore under oath in more than 100 separate discovery responses that Narendra was at all times prior to September 2, 2004 a "member" of ConnectU, LLC. In many of these instances, no reference was made to the 2005 Operating Agreement. The discovery responses were signed by Narendra under oath without ever reading them, relying instead on his attorney to answer properly. Narendra also testified that regardless of whether it conflicted with his position in Massachusetts Federal Court, he would not hesitate to restate that he always was a member of ConnectU, LLC if it would once again ensure that he was not subject to personal jurisdiction in California. This is precisely the kind of disregard of the legal process that warrants sanctions.

To justify their sanctionable conduct, Defendants advance three arguments:

1. The false testimony in Interrogatory No. 14 was a "credible explanation." Defendants ignore the hundreds of false statements that are not subject to the same "explanation." Further, in direct contrast to this "explanation" Defendants' counsel swore to the Court in a successful opposition to a motion to compel that:

   > "I advised Mr. Nagel that the composition of ConnectU's members has not changed since its inception."
   >
   > Reply Declaration of Monte M.F. Cooper ("Cooper Reply Decl."), Ex. 1 (2/3/06 Mosko Decl.), at 1:27-28.

2. Defendants claim the court did not rely on the false statements made about membership when the Superior Court dismissed the individual defendants. This premise is irrelevant under the law and a false statement of fact as set forth

above. In any event, counsel and client should not submit false testimony under any circumstances, particularly when knowingly used to further a litigation agenda.

3. Defendants claim the Massachusetts District Court absolved them of taking inconsistent positions when it held judicial estoppel was inapplicable to Divya Narendra's response to Special Interrogatory No. 14. *See* Defs' Opp. to Mot. for Sanctions, at 1:7-13; 1:22-27. The Massachusetts Federal Court held two days of evidentiary hearings because the inconsistencies in Defendants' discovery response and testimony warranted a credibility determination. Ultimately, after receiving all of the evidence, the Massachusetts Court sided with Facebook.

Facebook requests that the Court disregard the false description of the record proffered by defendants and issue sanctions as requested because of Defendants' and their counsel's inappropriate conduct.

II. DEFENDANTS IGNORE NARENDRA'S TESTIMONY THAT HE NEVER REVIEWED HIS OWN DISCOVERY RESPONSES

In their opposition, Defendants completely ignore the most troubling issues giving rise to the motion. Namely, Divya Narendra admitted to the Massachusetts Court that he answered and verified written jurisdictional discovery responses under oath in this action without knowing the questions asked:

> A You know, these responses [California State Action] were prepared by my counsel and, you know, I, I don't remember looking sort of responding to this and looking back at another document at the same time cause the questions are in a completely different document. But I trusted my lawyers that they would have been prepared, that their responses would have been prepared accurately.
>
> …
>
> A Again, when I signed this document I trusted my lawyers prepared it accurately and, you know, again all the questions are on different – it's fairly confusing. All the questions are not on this document so, you know, when I signed this is [sic] didn't see what the exact questions were for each one of these responses.

Chatterjee Decl., Ex. Z, II:51:18-52:18.[1] The Massachusetts Court expressed its clear concern that Narendra had provided sworn statements without even reading the questions to which he

[1] In responding to Form Interrogatory No. 1.1, Narendra had specifically sworn under oath that "I was the only person who prepared the responses to these Interrogatories." Cooper Decl., Ex. 5, Response No. 1.1.

responded:

> Q. So when you were asked to sign the form interrogatory answers --
> A. Right.
>
> Q. -- did you have this Exhibit 71, the actual form interrogatories at that time?
> A No, I did not.
>
> THE COURT: Are you saying you didn't know what questions you were answering?
>
> THE WITNESS: No, I mean, I, I basically trusted that my lawyers would have given the right answers. I had never seen this document?
>
> THE COURT: I mean, it just seems very odd that you would sign answers under pains and penalties of perjury to questions you'd never seen, but go ahead.

Id., II-80:4-17. To this serious ethical problem, Defendants and its counsel provide no response. Not once do they address this critical admission that one of the defendants, with counsel's full support, engaged in reckless conduct prejudicial to the administration of justice.

III. THE FALSEHOODS WERE NOT LIMITED TO INTERROGATORY NO. 14

Throughout their opposition, Defendants try to limit their sanctionable conduct to Narendra's response to Special Interrogatory No. 14, which they improperly characterize as "vague and poorly written."[2] *See* Defs' Opp. to Mot. for Sanctions, at 9-12. Defendants' positions (a) overlook the sworn testimony their attorney submitted in opposition to a motion to compel and (b) ignore the more than 100 additional sworn discovery responses they executed in addition to Special Interrogatory No. 14, which stated that Narendra was a member of the LLC, most of which make no reference to the 2005 Operating Agreement.

A. Defendants' Counsel Represented To The Superior Court That Narendra Was A Member From Inception

Defendants intimate that they never suggested to the Superior Court that Narendra was a member of ConnectU, LLC prior to August 5, 2005, and that the Superior Court could not have relied on any such representations because they were never presented in any pleadings. *See* Defs' Opp. to Mot. for Sanctions, at 4:22-5:5; 5:23-6:26. These contentions are wrong.

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[2] Defendants spent four pages attempting to show that Special Interrogatory No. 14 was "poorly worded," and hence Narendra's amended response was appropriate. Notably, though, Defendants fail to apprise the Court that the very reason Narendra had to provide an amended response is because the Santa Clara Superior Court over-ruled all of their objections to the Special Interrogatory. *See* Chatterjee Decl., Ex. M. Defendants did not raise vagueness as a grounds to resist supplementation. *See* Cooper Reply Decl., Ex. 2 (2/3/06 Opp.), at 16-18.

During jurisdictional discovery, Facebook served the Defendants with identical Special Interrogatories.[3] *See* Chatterjee Decl., Ex. XX. Those identical sets included a Special Interrogatory No. 13 which read:

> IDENTIFY the circumstances surrounding the formation AND maintenance of CONNECTU as a limited liability company, including without limitation, filings, investments, COMMUNICATIONS, PERSONS involved, capitalization, directors, officers, attorneys, investors, AND reasons for the formation, as well as organizational meetings, including without limitation meetings of directors, officers, board member, AND Members, Managers, AND Board of Managers, as defined in the Limited Liability Operating Agreement of ConnectU, LLC – bates numbers C011285 through C011335.

Id. (Special Interrogatory No. 13). Each of the Defendants responded:

> 13. Subject to the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows. This interrogatory is vague and overbroad. It is compound, complex and effectively represents at least eight separate interrogatories. To the extent ConnectU has not already produced documents about its formation and maintenance, all such non-privileged documents will be produced.

See Cooper Reply Decl., Ex. 3 . Given the failure of Defendants to specify which documents they were referring to, Facebook initiated a meet-and-confer to obtain supplementation of Special Interrogatory No. 13.[4] The meet-and-confer was unsuccessful, leading to a motion to compel.

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[3] Defendants incorrectly argue that the discovery sought regarding Defendants' membership was really designed for use in the Massachusetts action. The question of membership in Massachusetts did not arise until April 14, 2006, after Facebook filed a Notice of New Authority re *Pramco Ex Rel. CFSC Consor. v. San Juan Bay Marina,* 435 F.3d 51 (1st Cir. 2006). The *Pramco* decision put ConnectU's membership in issue for purposes of diversity jurisdiction in the Massachusetts action. Defendants' second amended interrogatory responses in this action were served on March 3, 2006 – more than one month before the issue arose in Massachusetts.

[4] While not ordering supplementation, the Superior Court nonetheless required that Defendants provide a declaration relating to all incorporated documents "that a diligent search and reasonable inquiry was made" in an effort to comply with the request, and that either (1) all documents had been produced, or (2) that they were unable to comply because the particular item never existed, had been destroyed, lost, misplaced, stolen, or had never been, or was no longer in the Defendants' possession, custody or control. Chatterjee Decl., Ex. M. The defendants provided such a declaration under oath. *See, e.g., id.*, Ex. N. However, despite the Declaration and their response to Special Interrogatory No. 13 that all ConnectU, LLC formation documents had been produced in the California action, Defendants did not produce any of the documents that they

When Facebook moved to compel further responses, Defendants argued in opposition papers that supplementation was unwarranted because "Defendants told Plaintiff there has been no change in ConnectU's membership or management since its inception." *Id.* Ex. 2 (2/3/06 Opp. Brief), at 17:4-5. Counsel for Defendants also submitted a declaration in support of the opposition summarizing the results of the meet and confer discussions, in which counsel swore under oath concerning Special Interrogatory No. 13:

> 4. During the latter part of December 2005, I participated in pre-motion conferences with Plaintiff's attorney Robert Nagel. During those conferences we discussed many issues, including the following:
>
> ...
>
> c. Also during this conference ***I advised Mr. Nagel that the composition of ConnectU's members has not changed since its inception.*** I asked Mr. Nagel if he wanted me to so state in the amended answers Defendants agreed to provide. Mr. Nagel answered that question in the negative.

Cooper Reply Decl., Ex. 1 (2/3/06 Mosko Decl)(emphasis added). The Santa Clara Superior Court ultimately denied Facebook's motion to compel supplemental Interrogatory No. 13 in light of this representation. *See* Chatterjee Decl., Ex. M. Defendants thus are incorrect to argue repeatedly that their warranty concerning Divya Narendra's membership was not brought to the Court's attention.

Defendants also overlook their numerous representations in the motion to quash that Divya Narendra was a member of ConnectU, LLC in the summer of 2004, and incorrectly argue that the Superior Court could not have relied upon those arguments. In that regard, Defendants repeatedly argued that they were not subject to personal jurisdiction in California for any acts occurring prior to September 2, 2004, because "[Defendants'] only 'tie' to California [took] the form of ***being members*** of Defendant ConnectU, LLC ...." Chatterjee Decl., Ex. B, at 1:18-19 (emphasis added). *See also id.* at 1:21-23; 3:1-2; 4:25-26; 6:24:25.

Nothing in the Superior Court's Order reflects that these arguments by Defendants were rejected. The Court's Order granting the motion to quash does not provide any reasoning

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later offered in Massachusetts to prove Narendra was **not** a member of ConnectU, LLC. As a result, the Massachusetts Court eventually ruled that those documents were of questionable relevance. *Id.* Ex. D, at 53-54 & n.24.

whatsoever. *See* Chatterjee Decl., Ex. R. Even Magistrate Judge Collings acknowledged that determination of the reasoning of the Superior Court was impossible. *Id.*, Ex. D, at 23. *Cf. Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"). Defendants contend that the Superior Court must have relied on its new arguments raised in reply because it silently abandoned its original argument. However, the new arguments in reply may not have been considered at all, because "points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." *Balboa Ins. Co. v. Aguirre* 149 Cal.App.3d 1002, 1010, 197 Cal.Rptr. 250 (1983).

B. Defendants Swore Hundreds Of Times In The California Action That Narendra Was A Member Of ConnectU, LLC Prior To September 2, 2004

Virtually the entire Opposition is directed to explaining only the Amended Response of Narendra to Special Interrogatory No. 14, which was compelled by Court Order. *See* Chatterjee Decl., Ex. M. Defendants miss the point. In opposing the Motion for Sanctions, Defendants offer no excuse why they repeatedly made false averments throughout discovery and in pleadings in this action, only to recant later in Massachusetts when it served their interests.

In addition to the examples already cited, between October 2005 and June 2, 2006 Defendants repeatedly and consistently argued that Divya Narendra acted only as "member" of ConnectU, LLC when he logged onto and downloaded email information from the Facebook website. These statements included seventy-two (72) separate responses by Defendants to Form Interrogatories and forty-five (45) separate admissions to Requests for Admissions that each of Divya, Cameron, and Tyler visited the Facebook website prior to September 2, 2004 only "in their official capacity as a member of ConnectU" (Chatterjee Decl., Exs. Q, MM, NN, PP, QQ, RR, SS).[5] These answers were given, in many instances, without reference to the 2005 Operating

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[5] Defendants also incorrectly claim that the hundreds of discovery responses they swore to stating that Narendra was a member of ConnectU, LLC were not material because they were not cited in Facebook's Opposition to the Motion to Quash. *See* Defs' Opp. to Mot. for Sanctions, at 6:14-6:22. To the contrary, in opposing the motion to quash, Facebook attached the amended responses to form interrogatories of each of Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra. *See* Cooper Reply Decl., Ex. 4 (Nagel Decl., ISO Opp'n to Mot. to Quash), Exs. E, F, G. Furthermore, it was Defendants who repeatedly testified that they were shielded by the "corporate immunity" doctrine as a result of their membership in ConnectU. Over 100 statements

Agreement. *See*, *e.g.*, *id.* Ex. MM, Response to Form Interrogatory 17.1; Ex. Q, Response to Requests for Admission Nos. 2-8, 15-21, 24. Divya Narendra's Response to Request for Admissions and corresponding explanations in his Form Interrogatories is representative:

> **REQUEST FOR ADMISSION NO. 2**
>
> Admit YOU have accessed THEFACEBOOK website for the purpose of acquiring email addresses previously registered with THEFACEBOOK
>
> **DIVYA NARENDRA'S RESPONSE TO REQUEST NO. 2**
>
> Responding party admits visiting FACEBOOK's website but ***only in his capacity as a member of ConnectU***. Regarding the remainder of the Request, see ConnectU's Response to Request No. 2.
>
> **FORM INTERROGATORY NO. 17.1**[6]
>
> Is your response to each request for admission served with these admissions an unqualified admission? If not, for each response that is not an unqualified admission:
> (a) state the number of the request;
> (b) state all facts upon which you base your response;
> (c) state the names **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of these facts; and
> (d) identify all **DOCUMENTS** and other tangible things that support your response and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.
>
> **DIVYA NARENDRA'S RESPONSE TO FORM INTERROGATORY NO. 17.1**
>
> Regarding Request No. 2, Responding Party visited FACEBOOK's website ***only in his capacity as a member of ConnectU***. *See* ConnectU's Response to Request No. 2 and its Response to Interrogatory No. 17.1 as concerns Request for Admissions, No. 2.

Id. Exs. WW, Q (emphasis added), VV, MM (emphasis added). As can be seen, neither the request, nor Narendra's response, referenced the 2005 Operating Agreement, despite the fact Narendra responded his actions were taken solely in his "capacity as a member of ConnectU" and were admittedly taken before the 2005 Operating Agreement was signed.

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purporting to support ConnectU's position were irrelevant to Facebook's argument to the contrary.

[6] This Form Interrogatory has been approved by the Supreme Judicial Counsil for use in all civil actions filed in the Superior Court. Notably, this is one of the Interrogatories for which Divya Narendra admitted he signed responses despite never reading the discovery request.

Moreover, the Superior Court ordered Narendra to supplement this and the Defendants' other responses, since they all were evasive and inadequate. *Id.* Ex. FF. As a result, each of the Defendants, including Narendra, stated that all of their actions taken against Facebook before the Operating Agreement was signed were as "members." Specifically, in their amended responses, Defendants cross-referenced their prior Amended Response to Special Interrogatory No. 14 when explaining why they contended their actions involving the "incident" of obtaining Facebook email account and course information were made only in their capacity as "members" of ConnectU, LLC during the summer of 2004, prior to when the Operating Agreement had been executed. *See id.* Exs. P, HH, II, Responses to Form Interrogatories Nos. 2.11, 8.2, & 17.1. *See also Id.*, Ex. Z, II 50:5-18; 52:23-53:2; Ex. Y I 255:5-256:25. Again, these responses were consistent with the position the individual defendants took in their motion to quash that "their only 'tie' to California takes the form of being members of Defendant ConnectU, LLC … ." *Id.*, Ex. K, 1:18-19. Each of these responses had verifications adopting the responses under oath and penalty of perjury. *Id.* Exs. O, P, Q, GG, HH, MM, NN, OO, PP, QQ, RR, SS, TT & UU.

C. Defendants Mischaracterized The Importance Of The Falsity

Defendants appear to argue "no-harm-no-foul" by claiming that the Court did not rely upon the numerous false statements made under oath. As set forth above, Defendants prevailed in opposing a motion to compel when making their false assertion related to membership, and further prevailed on the motion to quash which also asserted membership as a "fiduciary shield." More fundamentally, Defendants cannot credibly argue that their submission of false testimony and argument in the course of discovery is proper, whether or not it was submitted to a Court, and particularly when it was provided after a motion to compel was granted. Parties must respect the litigation process. Part of that obligation is not interfering with it by perpetrating fraud through perjurous behavior. *Cf. United States v. Associated Convalescent Enter., Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985) (affirming sanctions pursuant to 28 U.S.C. § 1927 where attorney failed to disclose potential conflict to court when he became counsel of record, since "an attorney has a duty of good faith and candor in dealing with the judiciary").

IV. THE MASSACHUSETTS COURT DID NOT "REJECT" PLAINTIFFS' POSITIONS

Defendants incorrectly characterize the holdings of the Massachusetts proceedings. Defendants contend that "the issue of whether inconsistent testimony was provided was already raised and decided against Facebook in the Massachusetts case." Defendants assert that the Massachusetts Court "found no inconsistency, and therefore rejected Facebook's judicial estoppel argument." *See* Defs' Opp. to Mot. for Sanctions, at 1:23-24; 4:16-17. Defendants thus argue that the Massachusetts Court must have "effectively concluded that the Superior Court was not misled by [Narendra's] asserted discovery responses ....." *Id.* at 4:3-19. Defendants' position is an incorrect reading of the Order.

Contrary to Defendants' argument, Magistrate Judge Collings did not hold that "the Superior Court was not misled by the asserted discovery responses." Magistrate Judge Collings would not apply judicial estoppel because the order provided no analysis. Specifically, the Massachusetts Court explained that because "the California judge provided no reasoning for his [June 2, 2006] decision [granting the motion to quash], it is impossible to say that the conditions for application of the doctrine of judicial estoppel have been met." Chatterjee Decl.,Ex. D, at 24. As the Boston Court noted, "it remains unknown upon which ground the [Superior] Court relied in making its ruling." *Id.* at 24. Magistrate Judge Collings acknowledged that Defendants argued in their motion to quash that they were immune to personal jurisdiction as "members" of ConnectU, LLC. *Id.* at 23. However, because other alternative grounds might exist for the Superior Court's ruling, Magistrate Judge Collings simply held that "it cannot be assumed the judge concluded that although Narendra had sufficient contacts with California, those contacts were only on behalf of ConnectU. ..." *Id.* at 24.

Defendants also incorrectly contend "the Massachusetts Court effectively rejected Facebook's claim that [Narendra's] interrogatory response was inconsistent with his subsequent testimony." *See* Defs. Opp'n to Mot. for Sanctions. at 1:9-10. A plain reading of the order (including the language from the Order omitted by Defendants) demonstrates the falsity of Defendant's assertion. Namely, the Court held that Narendra's testimony in Massachusetts was not "completely contradictory" such that there "***was a question of credibility, and that was best addressed in the context of an evidentiary hearing***." Chatterjee Decl., Ex. D, at 24-25 (emphasis added). Later, Magistrate Judge Collings rejected Defendants' arguments concerning the purported make-up of membership in ConnectU, LLC after a two-day evidentiary hearing. Chatterjee Decl., Ex. D, at 55. The Court weighed all of the evidence and found Defendants' litigation-inspired change of testimony not to be "particularly persuasive." *Id.* at 53-54. The Court also noted that documents relied upon by ConnectU had not been produced in California, despite a Court Order to do so. *Id.* at 53 n.24.

V. DEFENDANTS MADE NO EFFORT TO CORRECT THEIR IMPROPER ACTIONS

Defendants now contend that the Superior Court knew their arguments concerning a fiduciary shield were wrong, and Facebook's position was right. *See* Defs' Opp. to Mot. for Sanctions, at 6:26-7:11; 8:1-10. Defendants never notified the Court that they knew their "fiduciary shield" position lacked merit and in fact chose to litigate the position three times. As noted, in its original motion to quash, Defendants consistently argued that they were not subject to personal jurisdiction in California for any acts occurring prior to September 2, 2004, precisely because "[Defendants] only 'tie' to California [took] the form of being members of Defendant ConnectU, LLC ...." Chatterjee Decl., Ex. B, at 1:18-19. Defendants further argued in the motion to quash that "[a]cts taken by individuals in their LLC capacity cannot be considered relevant to whether a court can assert jurisdiction over corporate members." *Id.* at 1:21-23 (emphasis added). *See also id.* at 3 n.3 ("there is no evidence or allegation that the Individual Defendants acted in anything other than their corporate capacity in connection with such alleged acts"); *id.* at 3:1-2 ("the only connection the Individual Defendants have to the alleged acts in this case is as members of Defendant ConnectU, LLC"); *id.* at 4:25-26 ("the facts on which Plaintiff's claims are based occurred after ConnectU was created as an LLC"); *id.* at 6:24:25 ("The Individual Defendants did not take any acts regarding Plaintiff outside their positions as members of an LLC, and Plaintiff has no evidence that they did").

Similarly, they recently argued that the "corporate immunity" doctrine shielded co-defendants Pacific Northwest Software and Winston Williams from the assertion of personal jurisdiction ***in this Court***, again basing that contention on the same cases that they now argue Facebook established were inapplicable to the factual circumstances of this case. *See* Def. Pacific Northwest Software, Inc.'s & Def. Winston Williams Mot. to Dismiss for Lack of Pers. Juris. Pursuant to Fed. R. Civ. P. 12(b)(2) (Doc. No. 23, filed March 21, 2007), at 6:26-7:7. Most recently, Defendants re-incorporated their original motion to quash into their pending Motion to Dismiss filed in this action. *See* Defs.' Mot. to Dismiss (Doc. No. 136), at 7:3-7. This position, which Defendants now concede is meritless, is being asserted in the motion to dismiss pending before this Court, and the issue has never been withdrawn. Such incongruous behavior warrants the imposition of sanctions. *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) (an attorney's "reckless misstatements of law and fact, when coupled with an improper purpose, such as an attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in another case, are sanctionable under the court's inherent power").

Remarkably, because they now concede Facebook's arguments in opposition to their Motion to Quash were correct and persuasive, Defendants state that in their own Reply Brief they "did not respond to the authority cited by Facebook concerning their status with ConnectU," and instead raised "alternative compelling reasons" why no personal jurisdiction existed. Defs' Opp. to Mot. for Sanctions, at 8:11-14. Defendants imply that it must have been these new Reply Brief arguments that ultimately caused the Superior Court to dismiss the individual defendants. *See id.* at 8:11-28. *See also id.* at 3:5-6 (noting that case law "quite clearly" held Divya Narendra's membership in ConnectU, LLC "to be irrelevant in the Superior Court Motion to Quash"). As set forth above, the Superior Court order provides no guidance as to the basis for its holding. It is wrong for someone to assert otherwise.

Defendants admittedly never apprised the Superior Court or this Court that they knew their legal position was wrong. Sanctions may be imposed under both the Court's inherent powers and 28 U.S.C. § 1927 when an attorney "deliberately misrepresents legal authority in support of a nonfrivolous motion." *Premier Commercial Corp. Ltd. v. FMC Corp.*, 139 F.R.D. 670, 671 (N.D. Cal. 1991). Such arguments waste the resources of the Court and its staff in reviewing the record, and "[u]nless sanctions are imposed in these cases, some attorneys will see no incentive to maintain honesty and candor before the Court." *Id.* at 674.[7]

VI. SANCTIONS MAY BE IMPOSED IN THIS ACTION PURSUANT TO BOTH 28 U.S.C. § 1927 AND THE COURT'S INHERENT POWERS

Under the circumstances described above and in Facebook's opening brief, sanctions are appropriate under both 28 U.S.C. § 1927 and the Court's inherent powers. Defendants argue that this Court may not impose sanctions pursuant to either 28 U.S.C. § 1927 or the Court's inherent powers because their representations concerning Divya Narendra's membership occurred in collateral proceedings in Massachusetts. *See* Opp. to Mot. for Sanctions, at 17. This argument is baseless, and Defendants misconstrue Plaintiffs' position.

A. Sanctions Under 28 U.S.C. § 1927 Are Warranted Due To Defendants' Bad Faith And Reckless Behavior

Sanctions are appropriate where any attorney "so multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. Defendants argue this Court cannot impose sanctions under the statute because they again claim that the Massachusetts Court exonerated them in its judicial estoppel ruling, and because they contend their behavior is not as extreme as conduct which other courts have found amounted to bad faith and recklessness. Defs. Opp'n to Mot. for Sanctions, at 12-14, 17-20. As shown above, the Massachusetts court did not absolve their behavior before the Superior Court for repeatedly asserting Narendra's membership, and instead ruled this required a separate credibility determination. More to the point, though, throughout their arguments, Defendants wholly overlook their own conduct and the conduct of their attorneys independent of those events.

Defendants' behavior in this litigation is no less egregious than the behavior they suggest has evoked sanctions in other cases. Indeed, Defendants and their counsel have shown that they will go to any length to prevail – even if it means taking inconsistent positions under oath in separate litigation or in the same case, often just days apart. At this moment Defendants' are concurrently arguing in their opposition to the present motion for sanctions that Facebook was correct on the "fiduciary duty" shield law reasserting the "fiduciary shield" defense in their motion to dismiss. Here, Defendants fully concede that after Facebook filed its Opposition to the Motion to Quash, they knew their corporate immunity argument was incorrect, and yet they took no action to inform the Court. Opp. to Mot. for Sanctions, at 6:26-7:11; 8:1-19. Indeed, they even re-asserted the corporate immunity argument in two motions to dismiss filed in this removed action, despite now arguing they have known for more than a year that it is baseless. *See* Defs.' Mot. to Dismiss (Doc. No. 136), at 7:4-7; Def. Pacific Northwest Software, Inc.'s & Def. Winston Williams Mot. to Dismiss (Doc. No. 23, filed March 21, 2007), at 6:26-7:7. Defendants also have regularly submitted inconsistent and false testimony to serve their litigation agenda, even when ordered to provide complete and accurate responses. Because such conduct occurred in **this Court** and in **these proceedings** (as well as the same case when it was in State Court) sanctions can be appropriately imposed.[8]

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[7] Remaining silent despite such knowledge is particularly serious behavior, as it may implicate the Rules of Professional Conduct. *See* Cal. R. Prof. Cond. 5-200(B).

In fact, Defendants' knowing and bad faith assertion of legal argument is precisely the kind of conduct the statute is aimed to remedy. *Cf. In re Peoro*, 793 F.2d 1048, 1051 (9th Cir. 1986) (imposing sanctions on bankruptcy creditor who offered frivolous arguments as to why a lien avoidance was not res judicata, since no plausible basis existed for re-litigating the original avoidance by the Bankruptcy Court). Rather than inform either this Court or the Superior Court that they knew the "fiduciary shield" arguments they raised were incorrect as a matter of law, Defendants and their attorneys remained reticent. Tellingly, Pacific Northwest Software and Williams did not rebut Facebook's arguments on this issue in their reply brief in support of their motion to dismiss, either. This omission is not a mistake or excusable neglect. It is at least reckless, if not bad faith.

The Ninth Circuit has indicated conduct sufficient to warrant sanctions pursuant to 28 U.S.C. § 1927 "is present when an attorney knowingly or recklessly raises a frivolous argument

[8] Because Defendants' conduct has occurred in these proceedings in Federal Court and infect this entire case, Defendants' authority that sanctions pursuant to 28 U.S.C. § 1927 cannot be imposed for actions occurring in separate state court proceedings is inapplicable. *See* Defs. Opp'n to Mot. for Sanctions, at 15-17 (citing *GRiD Sys. Corp. v. John Fluke Mfg. Co., Inc.* 41 F.3d 1318 (9th Cir. 1994) and *In re Case*, 937 F.2d 1014 (5th Cir. 1991)). Those cases did not include improper conduct occurring before the District Court. This case does.

or argues a meritorious claim for the purpose of harassing an opponent." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th cir. 1989) (citation omitted). That is to say, "[a]n attorney becomes subject to § 1927 sanctions 'by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law.'" *Cinquini v. Donohoe*, 1996 WL 79822, at *8 (N.D. Cal. 1996) (quoting *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985)). As a result, sanctions should be imposed where there is a "showing of intent to prosecute a claim that lacks a plausible legal or factual basis, or a showing of bad faith or reckless conduct." *Id. See also Belliveau v. Thomson Financial, Inc.*, 2007 WL 1660999, at *2-*3 (E.D. Cal. 2007) (imposing fees for all proceedings occurring after a witness suing for wrongful termination testified in a deposition he had not been harassed).

Given their repeated arguments to the Superior Court that the corporate shield doctrine applied, their successful efforts to support that argument with hundreds of sworn statements that Narendra acted as a member of ConnectU, the Defendants' subsequent change of position in Massachusetts in an attempt to save diversity jurisdiction, and their further change of position in this Court in an effort to achieve dismissal, the facts of this case present the quintessential example of reckless and bad faith behavior. Further, when the Court also considers that many of these efforts implicate the very administration of justice, such as Narendra's admission he never read his discovery requests and instead relied upon his attorneys to answer, as well as his concession that he would re-assert his membership argument here if it guaranteed his dismissal, it is apparent this case represents the paradigm for imposition of sanctions.

B. Sanctions Are Warranted Under The Court's Inherent Powers

Sanctions also are appropriate pursuant to the Court's inherent powers. As Defendants themselves point out, such sanctions are appropriate "for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Fink v. Gomez,* 239 F.3d 989, 994 (9th Cir. 2001). Moreover, contrary to what Defendants suggest, the Court's inherent powers can extend to all conduct implicating the judicial process, regardless of the source. An attorney's "reckless misstatements of law and fact, when coupled with an improper purpose, such as an attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in another case, are sanctionable under the court's inherent power." *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 54 n.17 (1991) (noting sanctions properly extended to petitioner's actions occurring when notice to sue was first provided, even though that included events prior to suit). Thus, Defendants' improper actions in Massachusetts and the Superior Court are properly reviewed under this authority.[9]

The behavior described above was willful and, at minimum, reckless. Facebook has described discovery abuses and deliberate misstatements to multiple courts (including this Court) as well as to Plaintiff. Defendants' inconsistent positions taken with respect to the membership issue were demonstrably for an improper purpose. Defendants' assertion of a legal position, which they knew to be incorrect, also was willful, frivolous and in bad faith. Such actions should not be overlooked as mere nuisance. In light of all of Defendants' behavior, which permeated the Massachusetts action, the proceedings before the Superior Court, and the proceedings following removal in this Court, sanctions pursuant to the Court's inherent powers are warranted.

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant this Motion for Evidentiary and Related Sanctions.

Dated: September 26, 2007

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Monte M.F. Cooper /s/

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FACEBOOK, INC. and MARK ZUCKERBERG

[9] For this reason, the Fifth Circuit itself has subsequently acknowledged its decision *Matter of Case* is at tension with *Chambers*, and cannot be followed to the extent it is. *See CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 793-94 (5th Cir. 1993). Defendants' only authority suggesting the Court cannot exercise its inherent power is, in fact, the discredited *Matter of Case*. *See* Defs. Opp'n to Mot. for Sanctions, at 16-17.

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on September 26, 2007.

Dated: September 26, 2007.

Respectfully submitted,

/s/ Monte Cooper /s/

Monte Cooper